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JUDICIAL ADMINISTRATION IN THE FEDERAL COURTS. — In the National House of Representatives a bill (H. R. 9354) has been introduced, providing as follows: "Be it enacted, etc., That hereafter in any cause pending in any United States court, triable by jury, in which the jury has been impaneled to try the issue of facts, it shall be reversible error for the judge presiding in said court to express his personal opinion as to the credibility of witnesses or the weight of testimony involved in said issue: Provided, That nothing herein contained shall prevent the court directing a verdict when the same may be required or permitted as a matter of law.

"Sec. 2. That the judge of the court on the issue of law involved in said cause shall be required to deliver his charge to the jury after the introduction of testimony and before the argument of counsel on either side, and where requested by either party said charge shall be reduced to writing: Provided, however, That in United States courts sitting in States in which the law permits the trial judge to deliver his charge after argument of counsel, such procedure and practice may be followed by the trial judges in United States courts sitting in such States."

This bill has been favorably reported by the Judiciary Committee of the House. In the report, in which all the members of the committee concur, it is said that the expression of his opinion by a trial judge is "a clear invasion of the province of the jury, and therefore a flagrant usurpation of the prerogative of the jury to weigh the evidence." This is a great mistake. The history of trial by jury tells a different story. At common law it was always within the province of the judges to assist the jury by the expression of their opinions. Professor James Bradley Thayer, the greatest authority upon the subject of jury trials which

this country has produced; has said: "It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected."¹ Indeed it may well be doubted whether the provisions of the bill are not violations of the Sixth and Seventh Amendments to the federal constitution. Trial by jury does not mean trial by twelve laymen with unlimited power; it means trial by judge and jury. To allow the jury to invade the province of the judge is to deny the right to trial by jury.²

A number of states, particularly in the South and West, either by statute or decision or constitutional provision, have adopted one or both of the provisions of the proposed bill.³ But these are matters relating to judicial administration, to the conduct of the trial; and in these matters the federal courts are not required to conform to the state practice.⁴

There is a popular idea that the more the power of the jury is extended, the more democratic an institution a trial becomes. This is not so, if democracy means equality before the law, if it means equal justice for all. The jury cannot act without some expert assistance. The only experts present in the court room are the judge and the contesting counsel. The more the power of the judge is weakened, the more the power of counsel is increased. If their traditional power of advising the jury is taken from the judges, the trial is too apt to be reduced to a struggle between opposing counsel in which the party who employs the abler or perhaps the more unscrupulous counsel will be successful; and if counsel rather than the judge are entitled to the last word to the jury, this effect is still more pronounced.⁵ This is unjust; it is undemocratic.

Moreover, in summing up the evidence it is almost impossible for the judge, in cases in which the facts are at all complicated, to avoid an expression of opinion on any of the facts. The inevitable result of a

¹ THAYER, PRELIMINARY TREATISE ON EVIDENCE, 188, note.

² Mr. Justice Brown, "Judicial Independence," REP. AMER. BAR ASSOC., 1889, 205; and see *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899); *Opinion of the Justices*, 207 Mass. 606 (1911).

³ For a summary of the law of the various states on this point, and for an admirable discussion of the considerations of policy involved, see Sunderland, "The Inefficiency of the American Jury," 13 MICH. L. REV. 302.

⁴ *Nudd v. Burrows*, 91 U. S. 426 (1875).

⁵ "A system which gives full scope to the eloquence of lawyers and then denies the jury the assistance of the only trained and impartial mind in the court room, whatever its excuse in days of royal tyranny or lay magistrates, is today a senseless perversion." Ezra Thayer, "Judicial Administration," 63 U. OF PA. L. REV. 585, 594.

Dean Pound, the leading authority on procedural law in the United States, has expressed the opinion that "No small part of the exaggerated importance of the advocate in an American court of justice, of the free rein, one might almost say license, accorded him, while the judge must sit by and administer the rules of the combat, may be traced to frontier conditions and frontier modes of thought." Pound, "Some Principles of Procedural Reform," 4 ILL. L. REV. 388, 398.

statute forbidding the judges to express any opinion on the facts is to increase the necessity for new trials — and the multiplication of new trials is one of the worst evils of our system of procedure. The law reports of states where there are such statutes are full of such cases. Too often the granting of new trials means that the party with the longer purse will be successful. That is unjust; it is undemocratic.

Another very serious effect of taking from the judges their traditional power of supervising the conduct of the trial is to deter from accepting judicial office those who are best qualified. The whole system of trial by jury is dependent for its success as an efficient instrument in the administration of justice upon the competence of the judge who presides at the trial. In the admirable preliminary report on "Efficiency in the Administration of Justice" prepared for the National Economic League by President Eliot, Mr. Justice Brandeis, Dean Pound, Mr. Moorfield Storey and Mr. Adolph J. Rodenbeck, it is said:⁶ "In most jurisdictions there is too little power of guidance of the jury by the court. Juries are left at large to be swayed by advocacy with no judicial corrective. It is often said that we cannot trust our judges to exercise the common-law power of advising juries. But if we cannot provide a type of judge adequate to the demands of the judicial office, we must not expect the administration of justice to be efficient."

The efficient administration of justice is a matter of the most vital concern to the future of this country. There can be no question that the federal courts, upon the whole, have been very efficient. This has been due in no small part to the fact that the federal judges have retained the power of supervising and controlling the conduct of the trial. It would be a mistake, merely because there may have been dissatisfaction in some isolated instances with particular federal judges, to deprive the federal courts throughout the country of the power to administer justice. Indeed, it would be more than a mistake — it would be a tragedy.

THE LEGISLATIVE MINIMUM WAGE. — Proponents of social "legislation based on hopes rather than regrets"¹ have reason for satisfaction in recent triumphs of realism in the field of constitutional law.² The sustaining of the Oregon ten-hour law for factory workers³ has been followed by the affirming of the constitutionality of statutes in Oregon,⁴ Arkansas,⁵ and Minnesota,⁶ prescribing a minimum wage for women and minors in industry. Those who consider these measures

⁶ Page 26.

¹ See O. W. Holmes, "Ideals and Doubts," 10 ILL. L. REV. 1.

² See Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 HARV. L. REV. 353.

³ *Bunting v. Oregon*, 243 U. S. 426 (1917). See 28 HARV. L. REV. 89.

⁴ Oregon Minimum-Wage Cases: *Stettler v. O'Hara*, 69 Ore. 519, 139 Pac. 743 (1914); *Simpson v. O'Hara*, 70 Ore. 261, 141 Pac. 158 (1914), 243 U. S. 629. The Oregon law was upheld by an equally divided court. There was no opinion. Mr. Justice Brandeis took no part in the decision.

⁵ *State v. Crowe*, 197 S. W. 4 (Ark.) (1917).

⁶ *Williams v. Evans*, 165 N. W. 495 (Minn.) (1917).